IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36133

NICHOLAS D. FACKRELL,	)	**2009 Unpublished Opinion No. 738**
	)	
Petitioner-Appellant,	)	**Filed: December 22, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Seventh Judicial District, State of Idaho, Bonneville County. Hon. Jon J. Shindurling, District Judge.

Order summarily dismissing application for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Mark W. Olson, Deputy Attorney General, Boise, for respondent.

MELANSON, Judge

Nicholas D. Fackrell appeals from the district court's order summarily dismissing his application for post-conviction relief. For the reasons set forth below, we affirm.

I.

FACTS AND PROCEDURE

Fackrell entered an *Alford*[1] plea to burglary and was sentenced by the district court. Fackrell did not file a direct appeal, but later filed a pro se application for post-conviction relief. His application alleged that his sentence exceeded the statutory maximum because his credit for time served was miscalculated, the statute under which he was convicted was unconstitutional, and trial counsel was ineffective for failing to file a direct appeal. Fackrell's application and supporting affidavit provided that an *Alford* plea was entered so that an appeal could be made

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[1] *See North Carolina v. Alford*, 400 U.S. 25 (1970).

which counsel never timely filed. The state moved for summary dismissal arguing that Fackrell provided insufficient evidence to support his claims and had raised no genuine issue of material fact. At the hearing on the state's motion, Fackrell's post-conviction counsel admitted that the claims were meritless. The district court summarily dismissed Fackrell's application for failure to raise a genuine issue of material fact because it did not allege facts sufficient to make out a claim of ineffective assistance of counsel. Fackrell appeals.

II.

ANALYSIS

Fackrell challenges only the district court's summary dismissal of his claim of ineffective assistance of counsel for failing to file a direct appeal. An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). Like a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary dismissal of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact that, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct.

App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986).

On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993). In post-conviction actions, the district court, as the trier of fact, is not constrained to draw inferences in favor of the party opposing the motion for summary disposition; rather the district court is free to arrive at the most probable inferences to be drawn from uncontroverted evidence. *Hayes v. State*, 146 Idaho 353, 355, 195 P.3d 712, 714 (Ct. App. 2008).

In this case, Fackrell's application alleged ineffective assistance of counsel because an *Alford* plea "was made so that A appeal could be Made and, was never filed the appeal." In his factual affidavit attached to his application, Fackrell further alleged that the "reason for ineffective assistance of counsel is that I was afforded [an *Alford*] plea and did not get My appeal filed on time by my counsel." An attorney who disregards specific instructions from a defendant to file a notice of appeal acts in a manner that is professionally unreasonable. *See Beasley v. State*, 126 Idaho 356, 360, 883 P.2d 714, 718 (Ct. App. 1994). On the other hand, a defendant who explicitly instructs counsel not to file an appeal cannot later complain that, by following the defendant's instructions, counsel performed deficiently. *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000). Where the defendant has not conveyed his or her intent with respect to an appeal either way, the court must first determine whether trial counsel consulted with the defendant about an appeal. *Id.* at 478; *Pecone v. State*, 135 Idaho 865, 868, 26 P.3d 48, 51 (Ct. App. 2001). In this context, the term "consult" means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes. *Flores-Ortega*, 528 U.S. at 478. If counsel has consulted with the defendant, then counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with regard to an appeal. *Id.*

If counsel has not consulted with the defendant, then counsel's performance in failing to consult with the defendant is itself deficient if a rational defendant would want to appeal or the particular defendant reasonably demonstrated to counsel that he or she was interested in appealing. *Id.* at 480. In making these determinations, courts must take into account all the information counsel knew or should have known. *Id.* Once counsel's performance has been shown to be deficient, the defendant must demonstrate actual prejudice by showing that there is a reasonable probability that, but for counsel's deficient failure to consult with him or her about an appeal, the defendant would have timely appealed. *Id.* at 484. In ascertaining whether a defendant has made the requisite showing of prejudice, courts may consider whether there is evidence of nonfrivolous grounds for appeal or the defendant in question promptly expressed a desire to appeal. *Id.* at 485.

Fackrell's application does not allege that he instructed counsel to file an appeal nor does it allege that counsel failed to consult with Fackrell about an appeal. Furthermore, at the hearing on the state's motion for summary judgment, Fackrell's post-conviction counsel represented that trial counsel had sent Fackrell a letter indicating that there were no appealable issues and that an appeal would not be filed. Additionally, Fackrell's application failed to allege that he was prejudiced by any deficient performance by counsel. Fackrell argues that, under *Flores-Ortega*, 528 U.S. 470, he is relieved of showing prejudice because no specific prejudice analysis applies when he has been deprived of a constitutionally protected right. This Court has previously held that *Flores-Ortega* does not stand for this proposition. *See Murillo v. State*, 144 Idaho 449, 454, 163 P.3d 238, 243 (Ct. App. 2007) (holding that *Flores-Ortega* does not require a presumption of prejudice and that a post-conviction applicant must demonstrate that there was a reasonable probability that, but for counsel's deficient performance, he or she would have timely appealed). Therefore, the district court did not err by dismissing Fackrell's application for failure to raise a genuine issue of material fact.

Fackrell makes other arguments that the district court applied the wrong standard when it found that Fackrell had failed to assert that he had a basis for an appeal or that he asked for an appeal to be filed. He contends that the correct inquiry must also include an analysis of whether a rational defendant would desire an appeal. However, the district court did not so limit its analysis and properly considered Fackrell's complete failure to allege any facts stating a claim upon which relief may be granted. Fackrell also argues that his application impliedly raised an

inference that he wanted to file an appeal. However, this does not meet the particularity requirements of an application for post-conviction relief. Furthermore, even if Fackrell's application implied that he wanted to file an appeal, this is not the equivalent of alleging that counsel disobeyed instructions to file an appeal or failed to consult with Fackrell about an appeal.

III.

CONCLUSION

Fackrell's application for post-conviction relief failed to allege any facts that counsel failed to adhere to an express instruction to file an appeal or that counsel failed to consult with Fackrell about an appeal. Fackrell's application also failed to allege any facts that there was a reasonable probability that, but for counsel's deficient performance, he would have timely appealed. Therefore, Fackrell's application failed to raise a genuine issue of material fact concerning ineffective assistance of counsel. Accordingly, the district court's order summarily dismissing Fackrell's application for post-conviction relief is affirmed. No costs or attorney fees are awarded on appeal.

Judge GUTIERREZ and Judge GRATTON, **CONCUR.**